APPENDIX A

OPINION.

(Filed February 10, 1943.)

NEW JERSEY SUPREME COURT

No. 219 OCTOBER TERM, 1942.

DUKE POWER COMPANY,
Prosecutor,

v.

STATE BOARD OF TAX APPEALS OF THE STATE OF NEW JERSEY and HILLSBOROUGH TOWNSHIP,
Defendants.

Argued October 1942 Decided 1943

On Certiorari

1. A corporation chartered by this State but not doing business here is not subject to taxation upon intangibles in another State where taxes have been assessed upon them and have been paid within the time fixed by law. N. J. S. A. 54:4-3.2.

2. A county board of taxation must act judicially when there is a complaint that specified property has been omitted from the assessment lists.

3. Due notice of the complaint must be given to the owner of the property claimed to be omitted.

4. There must be due examination of the complaint and due consideration of the claims of the owner and a hearing before judgment may be entered.

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For the prosecutor, Pitney, Hardin & Ward, Shelton Pitney

For defendants, W. Eddy Heath, Frederick C. Vonhoff, Edward R. McGlynn, Joseph Weintraub.

Before Justices Bodine, Heher and Perskie.

BODINE, *J.* This writ brings before us for review a judgment of the State Board of Tax Appeals dated June 2, 1942, fixing an assessment against the prosecutor's intangibles in Hillsborough Township, Somerset County of $11,604,815.44, for the tax year 1939. The case was before the State Board on an appeal from a determination of the Somerset County Board of Taxation fixing an assessment of $8,143,159, and an amended assessment of $21,953,125. These assessments had been made on November 18, 1940, and November 22d, 1940, respectively, under circumstances to be hereafter related.

The jurisdiction of the County Board is challenged as it may well be, even though an appeal was taken to the State Board. Further, if the County Board lacked jurisdiction on the merits so did the State Board. Oradell v. State Board of Tax Appeals, 125 N. J. L. 37.

The State Board's judgment contained a finding that on the tax date, October 1, 1938, the prosecutor possessed the following intangible personal property of the values stated:

Cash in banks	$6,364,430.58
Cash on hand	11,962.35
Notes, accounts and interest receivable	5,005,460.21
Stocks in foreign companies	5,834,705.08
Bonds of other companies	83,079.00
Bonds of North Carolina and of municipalities therein	151,845.65

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The prosecutor is a New Jersey corporation and on the tax day in 1938 had its chief office in Hillsborough Township, Somerset County. Its charter prohibits any activities in this state. Its only property in this state are the transfer and stock books which must be kept here. All of the intangible property was secured and used in the course of business in the states mentioned. The transmission lines and plant are operated from a main office in Charlotte, North Carolina, and all its property is taxed under the Machinery Act of that state—a tax upon intangibles. The real and personal property situate in each state was also taxed. The intangibles were, of course, subject to taxation in this state if they do not fall within the exemption provided under N. J. S. A. 54:4-3.2. Newark Fire Ins. Co. v. State Board of Tax Appeals, 118 N. J. L. 525; N. J. Insurance Co. v. State Board of Tax Appeals, 119 Id. 245.

The proceeding originated in a letter to the Township Committee suggesting that personal property of a large corporation was not being taxed for the year 1939. The charge was made July 10, 1939. The writer was employed on a percentage basis to bring in the taxes. Thereafter, the Township Collector made complaint to the Somerset County Board of Taxation of the omission from the assessment of intangible personal property as follows: "Cash, $5,602,-986.00; Accounts, Notes and Interest Receivable, $5,268,663; Municipal Bonds, $246,308.00; Stocks, Bonds and other investments, $6,480,313; Deferred Charges, $75,607.00." From the complaint on prosecutor's motion all items save "cash" were struck. This action finds support in Newark v. Essex County Board of Taxation, 127 N. J. L. 527. The provisions of N. J. S. A. 54:4-15 do not apply to cash in this state, if there was any, since it is exempt under N. J. S. A. 54:4-3.23. MacPherson v. State Board, 127 N. J. L. 599.

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On November 13, 1940, the county board heard the case on the "cash" items. However, on November 18, 1940, by resolution at an ex parte hearing, it fixed an assessment on the basis of estimates of the value of intangibles made by certain persons who made affidavits. On November 22, 1940, the following resolution was passed: "Be it resolved that there be entered upon the tax lists and duplicates for Hillsborough Township for the taxing year 1939 a total assessment of $21,953,125.00 (Twenty-one Million, nine hundred fifty-three thousand, one hundred twenty-five dollars), thus amending an assessment determined by this Board on November 18th, 1940, against Duke Power Company, a New Jersey corporation covering omitted 'cash' only, which total amount represents the true value of intangible personal property wholly omitted by the local assessor for Hillsborough Township, Somerset County, New Jersey, on the assessing date, October 1st, 1938." By no such method could it make "cash" out of things not such.

The prosecutor had no notice of the hearing. It contends that both notice of the complaint and of the hearing thereon were necessary under N. J. S. A. 54:3-20. A mere notice was sent advising it of the amended assessment couched in the following language: "You are hereby notified of the entry of an amended assessment of $21,953,125.00 against Duke Power Company, a New Jersey corporation covering *intangible* taxable assets of said corporation for the taxing year of 1939, in Hillsborough Township, Somerset County, New Jersey. A true copy of the resolution fixing the aforesaid assessment is herewith enclosed." This resolution is to be found above. It specifies nothing but advises that there is a tremendous tax to be paid, if valid. The subterfuge of the resolution to make intangibles "cash" was dropped.

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The prosecutor later received the following notice: "Please take notice that the next meeting of Somerset County Board of Taxation will be held at the Court House in Somerville, New Jersey, at 10 A. M. on Monday, Secember 2nd, 1940."

In compliance therewith its counsel attended at the time specified and was told by the President of the Board: "We didn't ask you to be here. We simply notified you that we would have our regular meeting today and the reason for that was that if you desired to examine the records of the Board of that meeting (of Nov. 22, 1940) it was your privilege to do it."

A claim for exemption then presented was not allowed in evidence but was filed in the Board's records.

N. J. S. A. 54:3-20 provides a method for the inclusion of property omitted by the assessor and another method for the inclusion of property omitted from the assessment. Let us glance first at the procedure when property is omitted from the assessment. "On the written complaint of the collector, or any taxpayer of the taxing district or of the governing body thereof, that property specified has been omitted in the assessment, the county board, on *five days'* notice in writing to the owner by the party complaining, and after *due examination and hearing,* may enter the omitted property on the duplicate by *judgment rendered within ten days* after the hearing. * * * *Such proceeding may be brought within one year from the date when taxes on real property become a lien.*" The italics supplied.

There was no compliance whatever with the provisions of the law as we have seen. The notice was, in part, defective and there was no notice of the hearing when the question of the value of intangibles was determined, and no proceeding in a judicial manner as required by law. Duke Power

Co. v. Essex County Board of Taxation, 122 N. J. L. 589, aff. 124 Id. 41; followed in Porto Rican &c. v. Essex County Board of Taxation, 122 N. J. L. 595, aff. 124 Id. 134; Sun Oil Co. v. Essex County Board of Taxation, 122 N. J. L. 594, aff. 124 Id. 133.

The defendants contend that their proceedings were proper because it was under the first part of N. J. S. A. 54:3-20, which reads as follows: "The county board of taxation shall, by resolution, cause to be entered upon the tax duplicate a proper assessment against any property *omitted* by the assessor. The board shall then give immediate notice of such entry and of the time and place of its next meeting to the owner of the property affected, and furnish a copy of the entry to the clerk or collector of the taxing district, who shall enter it on his tax list."

There is a vast difference between the inclusion of property omitted by the assessor and property omitted from the assessment.

N. J. S. A. 54:4-55 provides: "The county board shall, on or before April first in each year, cause the corrected, revised and completed duplicates, certified by it to be a true record of the taxes assessed, to be delivered to the collectors of the various taxing districts in the county, and the tax lists shall remain in the office of the board as a public record." This limits action with respect to the property omitted by the assessor to April 1, 1939.

N. J. S. A. 54:4-47 provides: "The county board may adjourn from time to time in the discharge of its duties, and may, after investigation, revise, correct and equalize the assessed value of all property in the respective taxing districts, increase or decrease the assessed value of any property not truly valued, *add* to the lists and duplicates any property which has been omitted or overlooked, at its true

value, and in general do everything necessary for the taxation of all property in the county equally and at its true value."

But the time for this action finds a limitation in the following provision of law (N. J. S. A. 54:3-21): "A taxpayer feeling aggrieved by the assessed valuation of his property, or feeling that he is discriminated against by the assessed valuation of other property in the county, or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, *may on or before August fifteenth* appeal to the county board of taxation by filing with it a petition of appeal. A copy thereof shall also be filed with the clerk or attorney of the taxing district, setting forth the cause of complaint, the nature and location of the assessed property and the relief sought. The petition shall be signed and sworn to by the petitioner or his agent, and shall be in such form and contain such further information as may be from time to time prescribed by rule of the board, for the better understanding and determination of the appeal." This limits an appeal to a period closed August 15, 1939.

N. J. S. A. 54:3-26 provides: "The county board of taxation shall hear and determine all such appeals within three months after the last day for filing such appeals, and shall keep a record of its judgments thereon in permanent form, and shall transmit a memorandum of its judgment to the taxpayer, and in all cases where the amount of tax to be paid shall be changed as a result of an appeal, to the collector of the taxing district." This requires a determination before November 15, 1939.

That there must be some limit of time as to the settlement of tax controversies is apparent from the statute and the

cases. Kenilworth v. Board of Equalization, 78 N. J. L. 302; Acquackanonk Water Co. v. Passaic County Board, 88 Id. 555.

The county board could not, on its own motion, make the assessment on November 22, 1940 and then act as an appellate body on December 2, 1940. It was not acting according to law at either time. It might just as well have taken the figures for the assessment out of a news report.

The assessment was made on the complaint of an aggrieved taxpayer, and the procedural direction of the statute required a specific notice to the owner of the precise property claimed to be omitted from the assessment and a hearing upon notice and a deliberate judgment.

The underlying question in the case is the proper construction of the statute N. J. S. A. 54:3-20 and a determination as to whether there is a difference in the phraseology "property omitted by the assessor" and "property omitted in the assessment." Both phrases have occurred in our statutes since P. L. 1848, p. 230 was enacted. The first statute had two paragraphs. They were combined in substantially the present form in the Revision of 1903. If property in a taxing district is omitted by the assessor it must be added to the assessment before April 1st. Its addition decreases the amount of taxes to be raised since the ratables are thereby increased. The taxpayer is not embarrassed. He knows he will have a tax to pay and is liable anyway even if the property was not included in the assessment. However, if property is added to the assessment after the rate has been fixed it gives rise to a municipal windfall. There is no harm in this if there were due notice and a fair hearing by the county board and a judicial determination by it. The procedure adopted in this case was not in accordance with the statute. Property omitted by the assessor

must be added before April 1st, so that the rate of taxation may be determined. Thereafter, the addition of property omitted from the assessment must be in accordance with the part of the statute first quoted. Mitsch v. Riverside, 86 N. J. L. 603; Shillingsburg v. Greenwich, 83 Id. 129.

The duplicates, when delivered by the county boards under N. J. S. A. 54:4-55, must be certified by these boards "to be a true record of the taxes assessed." That means rates and amounts of taxes in addition to valuations. These rates and amounts of taxes are ascertained and fixed by the county boards under N. J. S. A. 54:4-48 and 54:4-49 upon reports made of needed funds for state, county and district purposes under N. J. S. A. 54:4-32, 54:4-39, 54:4-40 and 54:4-41, and they may be ascertained and fixed only by the county boards under the statute.

Even if the statute did not require notice and a hearing, when property omitted in the assessment is to be added, still common justice would require such a proceeding. Jersey City v. Board of Equalization, 74 N. J. L. 753.

However, under our statutes the property in question was exempt from taxation. "The personal property owned by citizens or corporations of this state, situate and being out of the state, upon which taxes shall have been actually assessed and paid within twelve months next before October first, being the day prescribed by law for commencing the assessment shall be exempt from taxation under this chapter." N. J. S. A. 54:4-3.2.

Personal property is defined in N. J. S. A. 1:1-2 as follows: "'Personal Property' includes goods and chattels, rights and credits, moneys and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrances upon, property or any debt or financial obligation is created, acknowl-

edged, evidenced, transferred, discharged or defeated, in whole or in part, and everything except real property as herein defined which may be the subject of ownership."

The question is one of fact. There is no doubt that all the property assessed was out of the state. The question is simply whether taxes were actually assessed and paid thereon within twelve months next before October 1 of the year in which the assessment should have been made.

The Machinery Act of North Carolina is Chapter 291 of the Public Laws 1937. It imposes a tax upon all property tangible and intangible within the state. The taxes raised are apportioned among the subdivisions of the state as taxes are apportioned under several of our taxing statutes imposing taxes upon public service corporations. The proofs show the assessment and payment of taxes in accordance with the act. The tax dates may vary somewhat, but for the twelve months prior to the assessment date there can be no doubt of the assessment and payment of taxes upon all the property included in the assessment here questioned.

The proofs clearly demonstrate that taxes had been assessed and been paid in North Carolina upon the property included in the assessment by the State Board. There was no basis for a conclusion that the property did not fall within the exempting statute. At all events, the only item included in the assessment when perhaps the proper procedure was complied with before the county board, i. e., "cash", was taxed in North Carolina so that the exemption statute of necessity applied.

Since none of the property in question was liable to taxation in Hillsborough Township, we need not consider the application of the remedial statutes N. J. S. A. 54:4-58 to 54:4-60. However, the remedial statutes we do not find to have been a substitute for proper assessment. Their appli-

cation has been only in instances where property has been omitted by the assessor or has been assessed in the name of one other than the true owner. Musconetcong Iron Works v. Borough of Netcong, 90 N. J. L. 58; Manistee Iron Works v. Raritan, 12 N. J. Misc. 143. But they do not apply where the statute for the addition of property omitted from the assessment is not complied with. Mitsch v. Riverside, 86 N. J. L. 603; Shillingsburg v. Greenwich, 83 Id. 129.

Since the property assessed was not subject to taxation and since the procedure before the State Board was no substitute for a proper proceeding before the County Board, the assessment is set aside and the judgment is reversed.

APPENDIX B

CASES AT LAW

Determined in the

COURT OF ERRORS AND APPEALS

of the

STATE OF NEW JERSEY

March Term, 1919.

(93 N. J. Law, 127.)

Helen Garland, Respondent v. The Furst Store, A corporation, appellant.

Argued November 26, 1918—Decided May 8, 1919.

1. Where liability is made to depend at all upon notice to a party, the adversary party must establish the notice before the other is called upon to contest it.

2. A mere fall of a person on the premises of another without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply.

3. Whether a jury is ordered by the court to inspect or examine premises as an aid in ascertaining the truth of any matter in dispute between the parties to an action under the Evidence act (*Comp. Stat., p.* 2229, § 30), or to view any place to enable the jury better to understand the evidence given in the cause under the Jury act (*Comp. Stat., p.* 2976, §§ 31, 35), the judgment rendered

by the jury should, nevertheless, be reversed if legally unsupportable in and by the record under review, as the questions presented to an appellate court should be decided upon what appears in the record brought up from the court below, notwithstanding a view was had by the jury which tried the cause.

On appeal from the Supreme Court.

For the appellant, *Runyon & Autenreith* and *Walter L. McDermott.*

For the respondent, *Doherty & Kinkead* and *Richard Doherty.*

The opinion of the court was delivered by

Walker, Chancellor. This is an action at law for alleged negligence resulting in personal injuries. It was tried before Judge Cutler and a jury in the Hudson Circuit Court, and upon the trial, on motion of the appellant, the jury were permitted to view the scene of the accident. Motions to nonsuit and to direct a verdict were denied, the jury rendered a verdict for the plaintiff, and upon appeal to the Supreme Court the judgment was affirmed. From the judgment entered upon that affirmance an appeal has been taken to this court.

* * * * * * * * *

The mere fact that Mrs. Garland fell on the floor of the Furst store, without any evidence to show how the fall was occasioned, raises no presumption of negligence on the part of the owner, and the doctrine of *res ipsa loquitur,* which is only applicable when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply. As the majority of this court said

in *Cronecker* v. *Hall*, 92 *N. J. L.* 450 (at p. 452), that there was no testimony worthy of the designation from which it could be inferred that what the defendant's agent did was done in the scope of his master's business; so, here, it can as pertinently be remarked that there is no testimony worthy of the name which shows that the defendant was negligent.

In our opinion a nonsuit, and failing that, a direction of a verdict for the defendant should have been ordered at the trial.

But the defendant-respondent contends that as there was a jury of view the observations of the jurymen are evidence in the case, and, as a court of appeal cannot know what they saw, the verdict of the jury may not be set aside.

The Supreme Court in its opinion stated that it was argued for appellant, and with much force, that the floor was of standard material, in general use for the purpose, and that there was no evidence of any lack of ordinary care in using and maintaining it, but the difficulty about adopting that line of reasoning was that the jury went to examine the floor, at the instance of the defendant's counsel, who asserted that it was in the same condition at the time of trial as it was in when plaintiff sustained her injury; that the jury came back and returned a verdict for the plaintiff; that what they saw or felt, or both, did not appear in the printed case, and the court could not tell but that their observation disclosed a condition which, if referred back to the time of the accident, was persuasive of negligence on the defendant's part.

This was, in effect, a ruling that what the jury saw amounted to mute evidence tending to establish defendant's negligence, and for that reason, in addition to the other one given, namely, that there was evidence of an unusually slippery floor, stated *arguendo*, the judgment was affirmed, ap-

parently upon the theory that because the extent to which the view afforded evidence could not be known, the verdict could not be overridden even if the proofs to be found in the record were not in and of themselves sufficient to sustain the jury's finding. This we deem to be error. In our opinion, for reasons to be presently stated, a judgment should be reversed if legally unsupportable in and by the record under review, notwithstanding a view of the premises by the jury.

The respondent urges that the view by the jury was had under section 30 of the Evidence act. *Comp. Stat., p.* 2229. It is true that section 30 provides that in case it shall appear that an inspection or examination of any premises would aid in ascertaining the truth of any matter in dispute between the parties to an action, it shall be lawful for the court to order an inspection or examination of the premises by the jury or the opposite party or parties or such persons as shall be named as witnesses, which inspection or examination may be ordered either before or during the progress of the trial. This is not the jury of view statute, strictly so called. That is to be found in the Jury Act. *Comp. Stat. p.* 2976, §§ 31, 35.

The inspection or examination by the jury under section 30 of the Evidence act is not accompanied with showers, as is the case under section 31 of the Jury act. That act, in section 35, provides that the court may at any time after the jury is drawn, order that the jury shall view any place, if, in the judgment of the court, such view is necessary to enable the jury better to understand the evidence given in the cause, and such view shall thereupon be had in such manner as the court shall direct. The motion in this case was for the appointment of a jury of view rather than one of inspection or examination; assuming there is any substantial difference between them. Counsel for the defendant-appellant moved

for permission to have the jury go and look at the floor, and the trial judge ruled that he would allow the jury to go under the care of an officer to view the premises, and that each side might select a man, a shower, of course, although that was not stated. Obviously, if the court ordered an inspection or examination by a party or witness under the Evidence act, either could give testimony before the jury as to what they saw; but if the jury made the inspection or examination, what they saw might aid in ascertaining the truth. That would be no more than enabling the jury better to understand the evidence by a view under the Jury act. It is quite impossible to believe that the legislature intended to place upon the statute books two schemes with reference to views by juries, one in which what they saw should be substantive evidence and the other not.

In the view we take of this question, it is unnecessary to decide to what extent an inspection or examination of premises under section 30 of the Evidence act, or view of the premises under sections 31 and 35 of the Jury act, may or may not be evidential, for, in no event, could either be conclusive and thus prevent the court from controlling the issue as matter of law.

The defendant-appellant cites two cases in this state on the question of view—*Gaunt* v. *State*, 50 *N. J. L.* 490, and *De Gray* v. *New York and New Jersey Tel. Co.*, 68 *Id.* 455. Gaunt *v.* State is, if anything, against his position. It was there held that upon the trial of an indictment for fornication, where the bastard and the putative father were viewed by the jury, the jury might consider whether there was a resemblance or not between them, and that in such cases the proper instrument of proof is inspection by the jury and not the testimony of witnesses—that is, resemblance between the child and the putative father. But this case is not an au-

thority, to the effect that a judgment may not be reversed, because there has been a view by the jury. Mr. Justice Garrison, who wrote the opinion, concludes with the assertion that the child was in court during the trial and the attention of the jury was directed to it, that the defendant was a witness, and that in those circumstances it was not error for the court to refuse to charge the jury that they must not consider the question of resemblance at all, and that if they did consider it, it must be from the testimony from the mouths of witnesses and not from their own view. Thus it appears that the only question decided was, that it was not error for the trial judge to refuse to charge that the jury must not consider the question of resemblance, and if they did, it must be from the testimony of witnesses and not from their own view. The case therefore, is not an authority on the precise question under discussion in the case at bar. Nor is De Gray *v.* New York and New Jersey Tel. Co. That was a trial of an appeal from an award of commissioners who assessed land in condemnation proceedings. The trial judge charged, among other things, that the jury might adopt the opinions of witnesses so far as reasonable, and had the right to take into consideration their own experience as to whether certain structures were detrimental to the market value of abutting property, and if, in their experience, they were, the jury would make the compensation accordingly, and if they were not, and the jury were not inclined to adopt the views that had been expressed to the contrary, their award would be proportionally less. This was held to be errror for several reasons, among which was, that to avail a party of a fact known to a juror he must be sworn and examined as any other witness, so that his evidence, like that of any other witness, may be first scrutinized as to its competence and bearing upon the issue, and for the further reason that the

court and parties may know upon what evidence the verdict was rendered. Under this charge the jurors were permitted to arrive at a verdict upon their personal knowledge or experience, and to be, in effect, witnesses before their co-jurors. This does not touch the question of the evidential effect of an inspection or view of given premises, or whether or not in a case where an inspection or view is had the verdict may not be set aside as against the weight of the evidence or because there was no legal evidence given on the trial which would support it.

The question being an open one in this state we are at liberty to adopt that principle which we think more consonant with reason and better calculated to serve the ends of justice.

In *Seaverns* v. *Lischinski*, 181 *Ill.* 358, Chief Justice Cartwright observed that it had never been held in Illinois that a jury might return a verdict upon their own knowledge unsupported by other evidence, whether such knowledge was acquired in or out of court by a view or otherwise, and a verdict based exclusively on knowledge so acquired would be set aside for want of substantial evidence to support it; that a verdict unsupported by sworn testimony upon disputed facts has always been successfully challenged, whether there was a view or not, and if a jury had disregarded such evidence, or there was none which a reasonable person might believe and act upon, the verdict should be set aside; that in the very nature of things it is ordinarily impossible to put in the bill of exceptions persons, places or things exhibited to a jury; that the sense in which a bill of exceptions is understood is, that the bill contains all the evidence if it contains that which was presented at the trial, although objects, persons or scenes, of which the jury may have had a view, are not contained in it; that cases where a view has been permitted which the jury might consider in arriving

at their verdict, either as evidence or to enable them to construe and apply the testimony, stand on a somewhat different footing than where there has been no such view, and a verdict cannot be based alone upon seeing a rope or a building or the evidence of the senses.

In the case of *People* v. *Thorn*, 156 *N. Y.* 286, a criminal case, the New York Court of Appeals observed that if the view were a part of the trial, or was the taking of testimony upon the trial, it may be that the view could not take place in the absence of the defendant; but they were not prepared to concede that the view was a part of the trial or was the taking of evidence. The trial could not take place in the absence of the judge, jury and defendant, and yet the provision of the code did not require the judge to attend upon the jury during the time it was inspecting the premises; that it was doubtless true that jurors might draw inferences from the objects which came under their vision; that if viewing the locality during the trial were the taking of testimony, why was not the seeing of the locality before the trial the taking of testimony? That if seeing were the taking of evidence, it would follow in every case that a juror who had seen, and was familiar with, the locality, would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted.

In that case the view was had under a provision in the New York code of criminal procedure, which, however, contains no peculiar feature distinguishing the view in those cases from one had in a civil cause. The case is a particularly strong one against the theory that a view by a jury constitutes the taking of evidence, because in that, a murder case, the defendant and his counsel were absent. It is true that defendant's counsel requested the view and waived

the right of the defendant and himself to be present; but, after conviction of murder in the first degree, it was contended on behalf of the defendant, that the inspection was part of the trial and the taking of evidence, which could only be done in the presence of the defendant in a capital case, and that his waiver was void. It was held otherwise on the ground that the view was not a part of the trial and was not the taking of testimony.

It should be noted that the inspection or examination under section 30 of our Evidence act is to be ordered when it shall appear that such a proceeding would *aid in ascertaining the truth of any matter in dispute between the parties to an action,* not that it should be conclusive of anything or even evidence in and of itself. And the same is to be remarked of a view under sections 31 and 35 of the Jury act, where, by section 35, it is provided that the court may order that *the jury shall view any place if such view is necessary to enable the jury better to understand the evidence given in the cause.*

In our opinion the question presented to a court of review should be decided upon what appears in the record brought up to the appellate tribunal, notwithstanding that a view was had by the jury.

The judgment of the Supreme Court must be reversed, to the end that a *venire de novo* may issue.

APPENDIX C

NEW JERSEY MISCELLANEOUS REPORTS,
Vol. 11. 243.—

Supreme Court—Rich v. Inter-City Transportation Co.

HARRY RICH, PLAINTIFF-RESPONDENT, v. INTER-CITY TRANSPORTATION COMPANY, DEFENDANT-APPELLANT.

Submitted October 14, 1932—Decided March 25, 1933.

A judge, sitting without a jury, is not entitled to base a finding of fact upon any knowledge he may have, but he must confine himself to the evidence offered; he can only take judicial notice of facts generally known to all persons.

On appeal from the Passaic District Court.

Before Justices TRENCHARD and CASE.

For the plaintiff-respondent, *Dominick Marconi.*

For the defendant-appellant, *William V. Rosenkrans.*

PER CURIAM.

This action arises out of a collision between plaintiff's automobile and defendant's bus at a street intersection in the borough of Rutherford. The judge, sitting without a jury, rendered judgment for the plaintiff.

Of the several points sought to be made by the defendant on its appeal we find substance in none except the second, which is that the court erred in reaching a conclusion based on a factual finding not supported by the evidence. The questioned part of the court's finding is as follows:

"I don't think the bus driver could see the light at any point after he had passed the point on a line with the bench, unless he stooped low, because the court is familiar with the

construction of the bus and knows the sun visor that they have on, and at this particular location, where the bus is coming down hill, I don't think that he could see that light at any time after he passed Raymond avenue, unless he stooped low to look up. The court will therefore find in favor of the plaintiff for $500."

The assumed knowledge upon which the court relied in thus discarding the relevant and material testimony of the bus driver was not obtained from the evidence. Plaintiff's contention on the point is that the defendant becomes "frivolous when it argues that the judge cannot use, in arriving at his decision, knowledge general to persons in the locality where the collision occurred and where the trial was had, because the judge should have first been sworn as a witness to be allowed to use such knowledge." We think that the defendant's argument is not frivolous. It is not apparent that the knowledge was general to persons in the locality or elsewhere. It would indeed be difficult for a party litigant to prepare or to conduct his case if the issue could be disposed of an [on] adverse factual conceptions resting silently in the court's mind and arising entirely outside the walls of the court room. Against such a situation the party, because ignorant of its existence, is powerless to combat. The common law oath to a juror "well and truly to try the issue between the parties and a true verdict to give *according to the evidence*" (see 3 *Blacks. Com.* 365) is closely followed in the present statutory oath to a District Court juror that he "will well and truly try the matter in difference • • • and a true verdict give according to the evidence" (An act concerning District Courts—Revision of 1898—section 157, *Pamph. L.* 1898, *p.* 615).

Appendix C

The judge was sitting without a jury, but we know of no latitude that permitted him to reach a judgment except according to the evidence. Courts may take judicial notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence, and jurors may exercise their knowledge of human nature in determining the truthfulness or untruthfulness of a witness; but the present instance is not one of such.

Even where a view of premises, under legislative or judicial authority, has been had by a jury the Court of Errors and Appeals has held that the appeal should be decided upon what appears in the record (*Garland* v. *Furst Store*, 93 *N. J. L.* 127, 137; 107 *Atl. Rep.* 38), and that the mental impressions received by a jury under such circumstances are not to be taken as evidence adduced in court. *State Highway Commission* v. *Lincoln Terminal Corp.* (*Court of Errors and Appeals*), 110 *N. J. L.* 190; 164 *Atl. Rep.* 476.

The pivotal fact question in the instant case was what colors were shown by the traffic light as the vehicles of the respective parties entered upon the street intersection. The defendant's driver had testified that as he entered upon the intersection the light from his direction was green. We think that the court erred in basing its disbelief of that testimony upon the physical arrangement of the sun visor on the defendant's bus in relation to the grade of the highway and the position of the light—conditions that were not disclosed by the evidence and concerning which the court assumed to have knowledge from sources foreign to the case.

The judgment below will be reversed and a *venire de novo* will issue, costs to abide the event.